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In The

Supreme Court of the United States

LUFKIN INDUSTRIES, INC.,

Petitioner,

v.

SYLVESTER MCCLAIN, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Petitioner presents no "compelling reasons" for the Court to grant its Petition for a Writ of Certiorari ("Petition"). *See* Supreme Court Rule ("Sup. Ct. R.") 10. The Fifth Circuit's unanimous panel Opinion, which is fact-bound and announces no new or extended legal principles that might set precedent for other cases, does not merit review by this Court.[1] Petitioner does not assert that the Opinion is in conflict with a decision of another Court of Appeals or that the Fifth Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10 (a), (c). Although Petitioner contends that the Fifth Circuit's Opinion conflicts with Section 703(h) of Title VII of the Civil Rights Act of 1964 ("§ 703(h)"), 42 U.S.C. § 2000e-2(h), and Supreme Court case law, the purported conflicts are illusory.

Petitioner's contentions are based upon a misreading of the case law and distortions of the Fifth Circuit's holding and the facts as found by both courts below. In its attempt to identify an issue meriting this Court's attention, Petitioner seriously misrepresents the opinions below. There is no issue here of disturbing the well-settled protection afforded bona-fide seniority systems under § 703(h). Petitioner's hyperbolic assertion that the decision below will intrude

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[1] The Fifth Circuit's Opinion was authored by Chief Judge Edith H. Jones, and joined by Judges Patrick E. Higginbotham and Edith Brown Clement.

upon the collective bargaining process for Petitioner, much less other employers, is misguided. Plaintiffs did not seek, and neither court below ordered, any change in Petitioner's seniority system or collective bargaining agreement. As the courts below found, based on a rigorous review of the factual record, Petitioner did not follow its seniority system regularly or honestly, but routinely exercised its discretion to violate seniority rights in a way that disadvantaged African American workers in violation of Title VII.

The Fifth Circuit followed and applied well-settled case law regarding multi-part employment decision-making systems whose parts are not capable of separation for review. The trial court's factual findings that (1) Petitioner did not follow its seniority system; (2) the exceptions to seniority swallowed the rule and (3) it was not possible to separate out seniority-based promotions from those based on Petitioner's discriminatory application of qualification, attendance or other rules because (a) Petitioner's use of seniority was subject to its decisionmakers' discretion, (b) seniority was not the deciding factor in so many cases and (c) so many promotion records were missing or inaccurate, and the Fifth Circuit's affirmance of these findings, are all well grounded in the record.

Petitioner's second question, its challenge to the shortfall/back pay period considered by both courts below, also is not worthy of review. The resolution of this question based on detailed and somewhat unclear facts, with findings thereon by the two courts

below, is of no general importance to the development of the law or to other cases.

None of the criteria warranting this Court's review is present in this case. The questions presented are intensively factual, and the fact-based decisions of the courts below are not appropriate for review. The Petition therefore should be denied.

COUNTER-STATEMENT OF THE CASE

This case involves claims by a certified class of approximately 700 African American current and former employees of Petitioner Lufkin Industries, Inc. ("Lufkin") that Lufkin discriminated against them on account of race in making initial job assignments and promotions. (Record ("R") 87-98) Specifically, plaintiffs alleged that Lufkin's initial job assignments and promotion practices were highly subjective and resulted in unlawful disparate impact on the plaintiff class. Following a protracted pre-trial history that included two separate evidentiary hearings on class certification (R 650-51, 1002-5, 1012-3), two unsuccessful interlocutory appeals by Lufkin to the Fifth Circuit (R 5998, 9676-7), a two-year mediation that ultimately failed (Appendix to Defendant's Petition for Writ of Certiorari ("Pet. App.") 37a-39a) and extensive discovery, the case was tried. At the conclusion of the bench trial, at which a total of 25 witnesses testified and 163 exhibits, including the reports of the parties' statistical and sociological

experts, were admitted into evidence, the district court issued a 39-page Memorandum and Opinion finding that Lufkin's initial assignment and promotion practices lacked objective criteria or guidelines allowing Lufkin's managers – who are nearly exclusively white – to make these decisions using their own subjective criteria, resulting in unlawful disparate impact on Lufkin's African American employees in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000(e), *et seq.* (R 9410-48) Following further proceedings on matters related to remedies and other issues not relevant to the questions presented by Petitioner, the district court issued an Amended Final Judgment that reiterated verbatim its liability findings. (Pet. App. 37a-82a) On appeal and cross-appeal, the Fifth Circuit affirmed in part, reversed in part and remanded the case to the district court for further proceedings.[2] (Pet. App. 1a-36a)

The promotion practices at issue in this case are complicated.[3] There were substantial factual disputes below about the nature of the practices and their

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[2] On the matters raised by Lufkin in its Petition, the Fifth Circuit affirmed *in toto*.

[3] Lufkin's initial assignment practices are no longer at issue in the case as the Fifth Circuit found that they were not encompassed by the charge filed by named plaintiff Sylvester McClain with the Equal Employment Opportunity Commission and, therefore, plaintiffs had not exhausted the requisite administrative remedies for bringing a claim challenging the practices. (Pet. App. 5a-12a)

impact on African American employees; the district court, relying in part on credibility determinations, resolved the disputed factual issues in Respondents' favor. The Petition reiterates Lufkin's factual contentions on these points, which were explicitly rejected by both courts below, and distorts the courts' resolution of the factual disputes. Respondents, therefore, detail below the extensive factual findings made by the district court which were accepted by the Fifth Circuit.

1. The Two Lower Courts' Findings as to the Subjective Nature of Lufkin's Promotion Practices

In describing Lufkin's "promotion process for posted hourly jobs," Petitioner pretends to write on a blank slate. *See* Petition at 5-6. Petitioner ignores that the district court found as fact that Lufkin's promotion process was not as it is described in the Petition. (Pet. App. 58a ("Lufkin's official [promotion] policies describe . . . a color-blind process with no room for individual bias. Unfortunately, the evidence and testimony given before the court do not support Lufkin's claims.")) Although the court recognized that "[s]eniority is the main criterion" for promotions of hourly employees, it found that "ability is also a necessary qualification" and "Lufkin has established several other rules that affect promotions." (Pet. App. 42a-44a) The court found that the "ability" exception to seniority "appears to trump all other considerations." (Pet. App. 44a) Citing testimony of class members and

Lufkin's own managers and documentary evidence, including the Collective Bargaining Agreement ("CBA"), the court found that "Lufkin has many 'objective' requirements that it cites as binding rules, but the evidence before the court demonstrates that Lufkin's managers have considerable discretion in applying or ignoring those rules." (Pet. App. 62a) *See also* Pet. App. at 43a-44a ("some [promotion] criteria are objectively verifiable. . . . Other criteria are left to the satisfaction of individual managers.") The district court found that, as a result of this subjective decisionmaking, Lufkin's white employees are "selected and groomed for advancement" while African American employees are "more likely to be placed in dead-end positions." (Pet. App. 61a)

The Fifth Circuit affirmed these core findings of fact and in doing so, cited additional record evidence supporting them, including testimony from class members and admissions of Lufkin's Vice President of Human Resources Paul Perez, and other witnesses called by Lufkin. For example, the Fifth Circuit noted that:

> Plaintiffs offered evidence that promotions are not rigidly awarded according to seniority. Class members Sylvester McClain and Florine Thompson testified that they were personally bypassed for promotion in favor of a less senior white employee. Plaintiffs presented additional evidence that approximately half of all promotions were not awarded to the most senior bidder.

(Pet. App. 14a) The Fifth Circuit also noted that the CBA "contains an ability clause that allowed Lufkin to fill positions on the basis of ability, regardless of seniority. The evidence indicates that ability determinations were not governed by objective standards. Paul Perez, Lufkin's Vice President of Human Resources, agreed that the ability determination was subjective." (Pet. App. 14a-15a)

The Fifth Circuit also cited, with approval, plaintiff McClain's testimony "that supervisors did not always truly evaluate ability when awarding promotions under the ability clause, but simply gave the position to the candidate they favored." (Pet. App. 15a) Likewise, the Court noted that "Billy Webb, the union's chief spokesman [who was called by Lufkin], testified that the union had taken issue with the ability provision in past contract negotiations because it did not think that the ability clause was always administered fairly." (Pet. App. 15a)

The Fifth Circuit further noted that "[t]he CBA also provides for a ten-day trial period following promotion. According to the testimony of one of its managers, Lufkin has no written guidelines or formal tests for determining which employees pass this trial period," (Pet. App. 15a), and "Plaintiffs also offered evidence that Lufkin permitted its managers to apportion training opportunities subjectively, a process that disadvantaged black employees who sought promotions." (Pet. App. 15a)

Again citing the testimony of Lufkin's Vice President of Human Resources, the Fifth Circuit observed that:

> Perez testified that the CBA does not govern employees' daily work assignments, and he acknowledged that daily job assignments are not made on the basis of seniority[,] . . . there are no written policies determining who is to receive on-the-job training, and Lufkin does not track how such training is allocated among employees."

(Pet. App. 15a) The Fifth Circuit also cited with approval additional testimony of Mr. McClain that:

> [W]hite employees were given more training in areas that were relevant to the jobs he sought. McClain explained that when 'white managers and supervisors . . . see a man they want to put on a particular job, . . . they'll tap him' for training after his shift, or for external training. According to McClain, the employee who received the extra training would be the most qualified and would therefore receive the promotion once the job became available.

(Pet. App. 15a-16a)

In the same vein, the Fifth Circuit recited that the "district court also heard testimony that Lufkin's allegedly objective measures for determining which employees were eligible to bid, such as attendance and discipline records, are subject to variance and manipulation," (Pet. App. 16a), and cited the testimony of class

members Thompson and McClain "that the system was manipulable. If an employee was absent or tardy and the supervisor did not want the employee to lose credit, Thompson stated that the supervisor could non-schedule the employee or use the employee's vacation days to skew the records." (Pet. App. 16a) The Fifth Circuit also cited the testimony of Steve Reynolds, a Lufkin supervisor, who testified that, with respect to discipline, "there are no written criteria for determining when a rule violation should be 'written up.' He stated that this decision is left to individual supervisors."[4] (Pet. App. 16a)

As to the district court's fundamental finding that Lufkin's promotion practices were subjective, the

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[4] The district court also found that Lufkin's promotion practices for salaried employees were subjective, and that the company filled salaried positions with "anyone deemed suitable by Lufkin management." (Pet. App. 44a) The court found that qualified African Americans were not promoted or took longer than whites to be promoted to salaried positions, despite their qualifications. (Pet. App. 63a-64a)

The Fifth Circuit accepted these findings without qualification:

> The evidence also supported that Lufkin engaged in subjective decision making when awarding promotions in the salaried ranks. Salaried positions are not governed by the CBA, and company managers admitted that they were unaware of any guidelines, criteria, or documentation for the process of making promotions to salaried positions. Rather, most promotions in the salaried ranks are awarded through an interview process.

(Pet. App. 16a)

Fifth Circuit, properly recognizing the fact-finding province of the district court, concluded:

> In light of this evidence, we are not left with the definite and firm conviction that the district court erred in finding subjective decision making in Lufkin's promotion system. *See United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). Although Lufkin offered some testimony during the bench trial that would tend to refute the court's finding, it was within the province of the district court to accord this testimony less credibility than that of the class members and their experts. 'The reviewing court oversteps the bounds of its duty under [Federal] Rule [of Civil Procedure] 52(a) if it undertakes to duplicate the role of the lower court.' *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985). Accordingly, we cannot say the court's finding of subjective decision making in promotions amounted to clear error."

(Pet. App. 17a)

2. The Two Lower Courts' Findings as to the Appropriateness of Plaintiffs' Statistical Methodology in Analyzing Promotions

The district court acknowledged and discussed the proper standards and burdens for considering statistical evidence in a Title VII disparate impact case. (Pet. App. 52a-55a) Recognizing "the necessary primacy of statistical evidence" in a class action based on the adverse impact theory, (Pet. App. 54a-55a), like

this case, the court made detailed and specific fact findings on the statistical evidence of hourly and salaried promotions. (Pet. App. 64a-72a) As to each, the court found as fact that there were statistically significant disparities between white and African American employees which could not be explained by race-neutral factors. Moreover, on each set of positions, the court carefully considered the parties' experts' competing analytical methods and their validity, as well as their credibility, in light of the evidence about Lufkin's actual practices, and found that the analyses and conclusions plaintiffs presented were well supported and credible, while those of Lufkin were flawed. (Pet. App. 68a-71a)

In particular, the district court credited plaintiffs' expert Dr. Drogin's conclusions. (Pet. App. 67a-71a) Specifically, the court found that, to a statistically significant degree, African Americans received disproportionately fewer promotions than did whites, and fewer than would have been expected in a race-neutral promotional system, for both hourly and salaried positions. (Pet. App. 68a-71a, Record Excerpts of Plaintiffs-Appellants and Cross-Appellees ("RE") 172) This disparity in promotions resulted in a "shortfall" of 127 fewer African American promotions to hourly jobs than expected, with a statistical significance at the level of 7.61 standard deviations, or less

than one chance in ten trillion of random occurrence.[5] (RE 151, 158, 159, 160)

Lufkin and its expert Dr. Baker, attempted to show, but failed to convince the court, that the plaintiffs' promotion analysis was erroneous in method and result. Their basic critique of Dr. Drogin's analysis was that he relied on carefully constructed "availability pools," consisting of potential applicants with at least equal length of service and the same prior positions as those of the employees actually promoted by Lufkin. (RE 157-8, Transcript of Bench Trial ("RT") Dec. 10, 2003 at 62:9-64:3) Lufkin claimed the proper analysis should have been based on its own selective assortment of incomplete job postings, bid sheets, and promotion records. (Defendant's Trial Exhibit ("DX") 1 at 14) The court found and explained why it was not proper, or even possible, to rely on those records or to follow that analytical approach: Lufkin's underlying data was not shown to be accurate or reliable; moreover, it covered less than half the number of promotions, for reasons Dr. Baker was at a loss to explain, and it could not be determined how the missing information might have changed the result. (Pet. App. 69a-71a, RE 157, RT Dec. 10, 2003 at 65:8-70:17) In

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[5] As to salaried positions, with many fewer promotions to analyze, the court found a statistically significant shortfall of African American promotions, at the .05 level, thereby meeting the statistical convention for finding significance. Recognizing that the statistical significance was less robust due, in part, to sample size, the court found plaintiffs' analysis "more persuasive." (RE 151, 163, Pet. App. 70a-71a)

addition, the court found that Lufkin's approach ignored the effects of its managers' discriminatory actions in discouraging African American employees from seeking or accepting promotions,[6] thereby incorporating tainted data, skewing the "actual" promotional data Dr. Baker relied on. (Pet. App. 69a-71a, RT Dec. 10, 2003 at 209:1-210:4, 277:24-278:4)

As an alternative explanation for the racial disparity in promotions, Lufkin attempted to prove that an objective factor – seniority – governed promotions in hourly positions. (R 4791 at ¶ 102) However, statistical evidence showed that in fact less than half of promotions to hourly positions subject to the CBA were awarded to the most senior bidder. (RT Dec. 10, 2003 at 81:17-24, 83:25-84:9, 254:22-255:8, 281:16-23) The court found that Lufkin's many discretionary exceptions to the seniority rule, as well as its discriminatory allocation of training opportunities and manipulation of the "qualification" standard, undermined the rule of seniority in determining promotions. (Pet. App. 43a-44a, 61a-65a) In addition, the court noted that many bid sheets that should have been analyzed were missing from Dr. Baker's analysis, and it found Dr. Baker's approach defective because it failed to take into account the facts that "African Americans are systematically discouraged from bidding and from taking promotions, and have

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[6] The court found that these were routine practices at Lufkin. (Pet. App. 61a-63a)

difficulty getting training assignments." *Id.* The court found plaintiffs' expert's explanations and methods were valid, and rejected those offered by Lufkin. Specifically, the court found:

> Dr. Baker's rebuttal was unpersuasive. Her promotion analysis relies . . . on the information she was given by Lufkin's management. The court is not persuaded that the information is accurate or reliable.

(R 11996, Pet. App. 69a) The court also found "Dr. Baker's reliance on tainted data in support of questionable conclusions unconvincing." (Pet. App. 70a)

On appeal, Lufkin renewed its argument, now repeated for the third time in its Petition, that its promotion practices were capable of separation for analysis. The Fifth Circuit carefully considered and firmly rejected each of Lufkin's arguments that the district court abused its discretion in rejecting Lufkin's alternate explanations of how plaintiffs could have separately analyzed Lufkin's promotion practices. First, the Fifth Circuit considered and rejected Lufkin's argument that "plaintiffs' expert could have separated the challenged employment practices from its legitimate seniority system" and that plaintiffs' expert "included in his analysis numerous promotions that contributed to the statistical shortfall in black promotions, even though these jobs were indisputably awarded to the most senior candidate," noting:

> This argument ignores the district court's finding that Lufkin affords management

> considerable discretion in deciding whether to follow seniority in promotions. Plaintiffs could not statistically analyze the actual practice they challenge – subjective and discretionary application of the seniority provisions – by excluding promotions based on seniority. Seniority, the court found, was likely to have been irrelevant to the promotion.

(Pet. App. 19a)

Next, the Fifth Circuit considered and rejected Lufkin's contention that "plaintiffs should have separated out instances in which candidates were properly denied promotions because of unsatisfactory attendance," observing:

> This argument, too, runs afoul of the [district] court's finding that managers have substantial discretion in applying attendance rules. In such a system, a denial of promotion for poor attendance is not helpful to Lufkin where promotions may also have been awarded following non-uniform interpretation of employee attendance rules.

(Pet. App. 20a)

Lastly, the Fifth Circuit considered and rejected Lufkin's contention that its "'paper bid sheets provided additional information that plaintiffs could have separated for analysis,'" noting:

> To the contrary, the district court rejected the bid data, which Lufkin prepared for purposes

> of this litigation, as unreliable and incomplete; ample evidence supports this finding.

(Pet. App. 20a)

The Fifth Circuit concluded that "Lufkin has not suggested any viable way, consistent with the [district] court's findings, in which the plaintiffs could have separated the promotion criteria for review nor has it shown the district court clearly erred in so finding." (Pet. App. 20a) This constitutes an overall finding of fact demonstrating that Petitioner's basic factual contention cannot find support in the record.

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Between the Fifth Circuit's Opinion and § 703(h).

Petitioner does not contend that the Fifth Circuit's Opinion creates any circuit conflict or that the Fifth Circuit decided an important federal question that has not been settled by this Court. Instead, it hypothesizes a non-existent conflict between the Fifth Circuit's Opinion and § 703(h) by offering a strained and misleading argument that misreads the case law and distorts the Fifth Circuit's holding and the factual findings of both courts below. At its heart, the Petition seeks a merits-based review of factual findings made by two lower courts. To accept Petitioner's arguments, this Court "would be forced to disregard [its] repeated pronouncements that it 'cannot undertake to review concurrent findings of fact by two

courts below in the absence of a very obvious and exceptional showing of error.'" *Berenyi v. Dist. Dir., Immigration and Naturalization Serv.*, 385 U.S. 630, 670 (1967), citing *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949). As explained in *Berenyi*:

> The policy underlying the 'two-court' rule is obvious. This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues. When, as here, resolution of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force.

385 U.S. at 636.

Petitioner's arguments fail for these and the reasons discussed below.

A. Section 703(h) Is Not Implicated in This Case.

Petitioner's invocation of § 703(h) is misplaced. Notably, plaintiffs did not seek, and neither court below ordered, any change in the seniority system.[7]

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[7] Lufkin's contention that "[n]either the district court nor the Fifth Circuit explicitly addressed § 703(h), which Lufkin argued insulated seniority-based promotions from the disparate impact claim," Petition at 9, is misleading. Lufkin argued in the

(Continued on following page)

Plaintiffs contended, and the courts below found, that "Lufkin's subjective practices and policies disparately impacted its black employees." (Pet. App. 58a). Thus, Lufkin's reliance on *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), and other cases holding that proof of discriminatory intent is a necessary element of Title VII actions challenging seniority systems, *see* Petition at 13, 16, is misplaced for the simple reason that plaintiffs did not challenge Lufkin's seniority system as the cause of the disparities in promotions of African American workers. Nor did plaintiffs seek any injunctive relief that would alter Lufkin's seniority system. (Pet. App. 42a-44a)

In a feeble attempt to elevate its disagreement with the unanimous factual findings of two courts and four judges below to one worthy of this Court's review, Lufkin trots out a parade of horribles it says could result from the Fifth Circuit's ruling, including the fanciful prediction that it "will compel employers to re-evaluate their use of seniority systems to award

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district court and Fifth Circuit that "[b]y not excluding promotions based on departmental seniority, plaintiffs included in their analysis decisions which are lawful and which may explain any disparity alleged by Plaintiffs." Lufkin Industries' Brief of Appellee/Cross Appellant at 35-36. In fact, both the district court and the Fifth Circuit expressly addressed this contention by finding that it was not possible to separate seniority-based promotions from those based on discriminatory application of myriad rules and criteria because whether to consider seniority was a function of Petitioner's discretion, seniority was not the deciding factor in so many cases and Lufkin's promotion records were incomplete and inaccurate. (Pet. App. 17a-20a, 42a-44a)

benefits and thereby impinge on the freedom to bargain § 703(h) was meant to protect." Petition at 14. That is nonsense. The rulings below turn on the specific and unique facts of this case and have limited application. What plaintiffs challenged in this case is not Lufkin's seniority system but Lufkin's subjective decisionmaking – implemented, as the courts below found, without regard to seniority rights and in a manner that disadvantaged African American workers. The courts' factual findings on that issue provide the basis for the liability finding against Lufkin. (Pet. App. 13a-17a)

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982), which Lufkin cites, is inapplicable here. *Patterson* dealt with appropriate remedies where an employer adopts a discriminatory seniority system. *See id.* at 70 (finding that such relief "would very likely include an injunction against the future application of the system and backpay awards for those harmed by its application."). Here, plaintiffs did not challenge Lufkin's seniority system as discriminatory; they challenged Lufkin's subjective decisionmaking which departs from and distorts the application of seniority. Furthermore, the courts below found that Lufkin did not follow its seniority system; managers had considerable discretion to, and did, ignore it, and the exercise of that discretion had an adverse impact on African American workers. (Pet. App. 42a-44a) Additionally, plaintiffs do not seek an injunction against the future application of Lufkin's seniority system; they seek to enjoin the unfettered subjective

practices Lufkin employs in making promotion decisions that depart from the seniority provision.[8] Finally, the back pay that will be awarded to the class is based on wage losses African American workers suffered because of promotion disparities which the courts below found resulted from Lufkin's subjective promotion practices. (Pet. App. 72a-73a)

B. The Courts Below Made Factual Determinations – Based on the Specific Facts of the Case – That It Was Not Possible to Separately Analyze Any of Lufkin's Subjective Promotion Practices.

Petitioner cites no case of any court at any level in conflict with the lower courts' fact-bound application in this case of the "not-capable-of-separation-for-analysis" model authorized by the Civil Rights Act of 1991, 42 U.S.C. §§ 2000e-2(k)(1)(B)(i).[9] *See* Petition at

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[8] The issue of appropriate class injunctive relief will be determined by the district court on remand. (Pet. App. 33a) However, prior to the district court's issuance of the Amended Final Judgment, plaintiffs presented their injunctive relief proposals to the district court. None of the proposals sought to enjoin the future application of, or impinged in any way on, Lufkin's seniority system. (Pet. App. 42a-44a) In any event, the injunctive relief that will be, but has not yet been, ordered by the district court on remand, is not ripe for this Court's review.

[9] An exhaustive search by plaintiffs' counsel revealed that this arcane statutory provision has not been invoked in any other case in the Fifth Circuit in the 17 years since its enactment, thus further diminishing the need for this Court to review the application of it by the courts below.

18-21. In seeking to have this Court review whether the promotions Lufkin purportedly made on the basis of seniority could have been separately analyzed, Petitioner asks this Court to ignore factual findings made by the trial judge and unanimously accepted by the Fifth Circuit panel.

The district court's extensive findings of fact on the statistical and expert witness evidence – including whether promotions based on seniority could be separately analyzed – were based on weight and credibility determinations accorded to the parties' experts' testimony and documentary evidence underlying their opinions. The court found that Lufkin's bid sheets and bidding and job award procedures, on which its expert relied, were incomplete, inaccurate, and did not capture Lufkin's actual promotion process. The court found that, while "[i]n theory the posting process is a rigid and inflexible system that ensures the promotion of the most senior qualified person interested in the job," in reality, the process is rife with discretionary factors that negate the supposed objectivity of the process and factors used. (Pet. App. 43a-44a) It also found that, while "some of the criteria are objectively verifiable, . . . [o]ther criteria are left to the satisfaction of individual managers"; the subjectively-applied "ability clause" "trumps" seniority and other eligibility rules and factors subject to discretionary application, such as uncontrolled allocation of training and scheduling opportunities, allow bias to affect promotions. (Pet. App. 43a-44a, 61a-64a) It concluded with the general finding that

"Lufkin's managers have considerable discretion in applying or ignoring those rules," which are "all subject to flexibility and manipulation."[10] (Pet. App. 62a) The court also found that white employees are given "preferential treatment" in obtaining skills and training, (Pet. App. 63a), while "African-Americans are systematically discouraged from bidding on jobs [and] . . . taking promotions awarded through the bid process." (Pet. App. 69a-70a)

The court also questioned "whether all the bid sheets have been produced and whether Lufkin's resulting database is accurate," (Pet. App. 70a), based on Dr. Drogin's finding that bid sheets for over one-half the promotions were missing from Dr. Baker's database, which was prepared by defense counsel for litigation. (RE 157, RT Dec. 10, 2003 at 65:24-67:6, 69:11-22, Pet. App. 69a-70a) Therefore, the court concluded that analyzing these bid sheets would incorporate inaccuracies and "Dr. Baker's reliance on tainted data in support of questionable conclusions [was] unconvincing." (Pet. App. 70a)

The Fifth Circuit properly recognized and gave the required deference due to the fact-findings and credibility assessments of the trial court. (Pet. App. 21a) In affirming the district court's factual findings

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[10] Dr. Drogin reported that, even using Lufkin's proffered database, 1,431 promotions were awarded to a non-senior bidder. (Plaintiffs' Trial Exhibit ("PX") 139, RT Dec. 10, 2003 at 81:12-24, 83:4-16, 254:22-255:16)

discussed above, the Fifth Circuit concluded that "Lufkin has not suggested any viable way, consistent with the court's findings, in which the plaintiffs could have separated the promotion criteria for review nor has it shown the district court clearly erred in so finding."[11] (Pet. App. 20a)

Significantly, Lufkin's argument totally ignores that the district court considered and rejected as inaccurate and unreliable Lufkin's own promotion analysis which it claimed controlled for seniority. (Pet. App. 69a-70a) The Fifth Circuit expressly affirmed this finding, (Pet. App. 21a ("Faced with this battle of experts, the district judge credited the testimony of Dr. Drogin over that of Dr. Baker."), observing that "[a]n appellate court owes great deference to the findings of the trial court with respect to duly admitted expert testimony." (Pet. App. 21a)

In summary, Lufkin fails to meet its heavy burden to make a "very obvious and exceptional showing of error" necessary for this Court to review the unanimous factual findings of the courts below. *Berenyi*, 385 U.S. at 670.

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[11] In fact, Lufkin did not conduct any of the analyses it argued to the Fifth Circuit that plaintiffs "could have" done, *see* 14-16 *supra*, because the records to do so did not exist.

C. The Fifth Circuit's Opinion Does Not Conflict with *California Brewers Ass'n v. Bryant*.

Petitioner half-heartedly suggests that the Fifth Circuit's Opinion conflicts with *California Brewers Ass'n v. Bryant*, 444 U.S. 598 (1980). In that case, the Court held that a seniority system has two components. First, seniority rights are based on "some measure of time served in employment." *Id.* at 606. Second, seniority systems include "ancillary rules that accomplish certain necessary functions, but which may not themselves be directly related to length of employment." *Id.* at 607. Petitioner contends that under *California Brewers Ass'n*, Lufkin's "seniority provisions do not lose their [§ 703(h)] protection because of their use in combination with other factors." Petition at 23.

Petitioner did not raise this argument in either court below and should not be permitted to raise it for the first time in its Petition. *See United States v. Bean*, 537 U.S. 71, 75 n.2 (2002) (holding argument was waived because it was raised "for the first time in his brief on the merits to this Court."). Even so, Petitioner's argument misses the point. As discussed above, plaintiffs did not challenge Lufkin's seniority system and the courts below found as fact that Lufkin's subjective decisionmaking practices, which included broad and unchecked discretion by managers to ignore the seniority system, resulted in statistically significant disparities in promotions of hourly workers. (Pet. App. 42a-44a)

Petitioner's reliance on *California Brewers Ass'n* is ironically misplaced. *California Brewers Ass'n* explains that employment rules are not exempt from Title VII by § 703(h) "simply because those rules are dubbed 'seniority provisions' or have some nexus" to a seniority system. 444 U.S. at 608. Employment rules that give effect to subjectivity or distort a system that would reward longevity – precisely the type of practices challenged by plaintiffs in this case – are outside of § 703(h). 444 U.S. at 609-10. Petitioner's argument is in direct conflict with the rationale of *California Brewers Ass'n*. Furthermore, as discussed above, the courts below also found that there was no way to separately analyze Lufkin's promotion decisions allegedly based on its seniority provision and those based on other factors exclusive of that provision. *See* 14-16 *supra*.

II. There Is No Basis for the Court to Review Lufkin's Challenge to the Shortfall/Back Pay Period Finding of the Fifth Circuit.

Petitioner's second question, presenting its attempt to raise the shortfall/back pay period issue in scarcely over a page of cursory argument, also is not worthy of this Court's review. The resolution of this question, based on detailed and somewhat unclear facts, with findings thereon by the two courts below, is of no general importance to the development of the law or to other cases. Petitioner has not made "a very obvious and exceptional showing of error" to warrant

this Court's review of this question. *Berenyi*, 385 U.S. at 670.

CONCLUSION

For all of the reasons discussed herein, Petitioner has failed to show that the Fifth Circuit's unanimous panel Opinion is worthy of review by this Court. The Petition should be denied.

Respectfully submitted,

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